WOLF v. COLORADO OVERRULED: EXCLUSIONARY RULE EXTENDED TO STATES

Mapp v. Ohio
367 U.S. 643 (1961)

Upon receiving information that a person sought for questioning might be in the Mapp home, Cleveland police officers demanded entrance. Petitioner refused to admit them without a search warrant. The officers remained and when additional officers arrived, they forcibly entered the home.[1] Obscene material was discovered during the illegal, widespread search of the home. Petitioner was convicted in the common pleas court for possession of the obscene material.[2] The conviction was upheld by the Supreme Court of Ohio[3] but was reversed by the United States Supreme Court.[4]

The United States Supreme Court overruled its decision in *Wolf v. Colorado*[5] which permitted evidence obtained by an unreasonable search and seizure to be introduced in a state court prosecution for a state crime. The Court in *Wolf* had refused to extend to the states the holding of *Weeks v. United States*.[6] In *Weeks*, the purpose of the fourth amendment was interpreted "to put the courts of the United States and Federal officials, in the exercise of their power and authority under limitations and restraints as to the exercise of such power and authority. . . .[7] On this basis the Court in *Weeks* decided that evidence unlawfully obtained by federal officials in violation of the Constitution could not support a conviction. The Court in *Wolf* viewed the holding in *Weeks* as not being derived from the explicit requirements of the fourth amendment.[8] Thus, the use of illegally obtained evidence in a state court was not deemed to be a denial of due process.

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[1] A paper represented as a search warrant was briefly shown petitioner after the officers gained entrance to the home, but this "warrant" was not produced at the trial, and its absence was not accounted for.

[2] Petitioner was convicted under Ohio Rev. Code § 2905.34 which provides in part that "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book (or) . . . picture. . . ."

[3] 170 Ohio St. 427, 166 N.E.2d 387 (1960). Prior to the decision in the instant case, evidence obtained by an unlawful search, if competent and pertinent to the main issue in a criminal case, was admissable against the accused. State v. Lindway, 131 Ohio St. 166 (1936). A majority of the Ohio Court would declare § 2905.34 unconstitutional as a denial of the rights of free thought and expression guaranteed in the first amendment. However, since the Ohio Constitution requires a vote of all but one of the judges to declare a law unconstitutional, the conviction was upheld.

[4] 367 U.S. 643 (1961).

[5] 338 U.S. 25 (1949).

[6] 232 U.S. 383 (1914).

[7] *Id.* at 392.

[8] Wolf, *supra* note 5, at 28.

The asymmetry *Wolf* introduced into the law has now been replaced by a single standard. The double "plimsoll" line of due process for illegally obtained physical evidence has been replaced by a single line. The first line established was the means used to obtain the evidence with a distinction made between state and federal officers. Acts of federal officers violative of the fourth amendment would prevent the introduction of the evidence. These same acts *necessarily* violate the fourteenth amendment if committed by state officers. However, the court did not hold to this line. The second line regarding the *use* of evidence was established. The *use* was not considered in violation of the fourteenth amendment, *i.e.*, falling below the second plimsoll line, unless the methods of obtaining the evidence were of a *special* kind or amounted to a *gross* violation of individual rights.[9] Now only one line remains below which "due process" must fall before there has been a violation of constitutionally protected rights.[10]

Mapp raises the old issue of whether the exclusionary rule is only a rule of evidence promulgated under the Court's supervisory power over administration of criminal procedures in the lower federal courts or whether the rule has acquired constitutional stature in the context of the fourth amendment and can be applied to state proceedings through the due process clause. In the instant case the Court takes the position that the fourth amendment's guaranty against unreasonable search and seizure is enforceable against the states through the fourteenth amendment.[11] It follows that an individual has the right not to be convicted on the basis of evidence which has been obtained in violation of fourth amendment guarantees. It was unnecessary for the Court to reach this decision, however, since the issue presented by the appeal was whether the Ohio statute[12] was "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."[13]

Now that *Wolf* has been overruled, the question is whether the decision will accomplish its intended purpose—greater protection of the individual

9 Kamisar, *supra* note 15, at 1121-22; Rochin v. California, 343 U.S. 165 (1952); Irvine v. California, 347 U.S. 128 (1954).

10 "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Mapp, *supra* note 4, at 655.

11 Mapp, *supra* note 4, at 655.

12 *Supra* note 2.

13 Mapp, *supra* note 4, at 673, dissent by J. Harlan. The provision in Ohio Rev. Code § 2905.34 is very similar to a California Statute that made it "unlawful for any person to have in his possession any obscene or indecent writing, (or) book . . . in any place of business where . . . books . . . are sold or kept for sale." The court held this Statute invalid in Smith v. California, 361 U.S. 147 (1959). Thus in a logical extension in the holding in Smith, the court could have held the Ohio statute equally invalid. The legislative prohibition of possession of books and papers, if not held invalid, may discourage law-abiding people from even looking at books and pictures and thus interfere with the freedom of speech and press. Mapp, *supra* note 3, at 432.

and his right to privacy. This attempt to increase individual privacy seems inadequate considering the Court's present attitude towards the states' use of wire tapping and other electronic devices.[14] If illegally obtained physical evidence is excluded from state courts, the state officers may be discouraged from making forceful invasions of premises. However, these same officers are not discouraged from invading individual privacy by means of electronic devices because wire tapping is not considered a violation of the fourth amendment.[15] Even the Federal Communications Act of 1934 which prohibits wire tapping has not been interpreted to prohibit state use of wire tap evidence.[16]

Thus, while the exclusionary rule protects the property rights of the individual, it leaves his more important personal rights relatively unprotected.[17] The Court has said that the rule " . . . is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentives

[14] Evidence obtained by wire tapping is excluded from federal courts, whether it was secured by federal or state officials. Nardone v. United States, 302 U.S. 379 (1937) and Benanti v. United States, 355 U.S. 96 (1957). The basis for exclusion is the Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. 605. Wire tapping itself is not a constitutional violation of the fourth amendment. Olmstead v. United States, 277 U.S. 438 (1927). Since wire tapping is not prohibited by the Constitution, any prohibition imposed on the States must stem from § 605 of the Communications Act, which provides that no person shall intercept or disclose a communication without the permission of the sender. The court, however, has not interpreted § 605 as imposing any restrictions on the states' use of wire tap evidence. Schwartz v. Texas, 344 U.S. 199 (1952). In the latest decision of the court in this area, a federal injunction was denied to prevent state officials from using wire tap evidence even though obtained in violation of § 605. Pugach v. Dollinger, 365 U.S. 458 (1961).

[15] Olmstead v. United States, 277 U.S. 438 (1927).

[16] Schwartz v. Texas, 344 U.S. 199 (1952).

[17] Originally the enforcement of rules governing search and seizure was by direct remedies, such as suits for damages for false imprisonment or trespass. These remedies afforded the greatest protection to the law-abiding citizen and the least to the person committing a crime. Today these remedies fail to apply sufficient pressure of police to comply with rules governing search and seizure—hence the exclusionary rule. This shift to the exclusionary rule, however, has perhaps had the collateral consequence of shifting judicial protection further towards the protection of property rights and away from personal liberty. The greatest pressure is placed on the police to conform to the rules regarding searches, while less pressure is applied to secure conformance to the rules regarding arrest and detention. In its deterrent effect, the exclusionary rule affects only those aspects of police illegality likely to result in the acquisition of physical evidence of guilt. Illegal arrests and other forms of police illegality are not effected by the rule. This focusing of judicial attention on search and seizure tends to create an impression that other forms of police illegality which invade personal rights and liberties are of lesser importance. Rios v. United States, 364, U.S. 253 (1960) and Abel v. United States, 363 U.S. 217 (1960) are illustrative of this. Barret, Jr., "Personal Rights, Property Rights, and the Fourth Amendment," The Supreme Court Review, 47 (1960). See Kamisar, "Wolf and Lustig Ten Years Later; Illegal State Evidence in State and Federal Courts," 43 Minn. L. Rev. 1083, 1145-58 for a more optimistic view of the exclusionary rule.

to disregard it."[18] However, the rule deters only those aspects of police illegality which are likely to result in the acquisition of physical evidence. The rule does not deter wire tapping, illegal arrest designed to harass, physical abuse of a suspect, unnecessary destruction of property, illegal detention not motivated to secure a confession, and other forms of police abuse.[19]

Every state has a provision in its constitution similar to the fourth amendment.[20] Twenty-six of these states have adopted the exclusionary rule.[21] This adoption of the rule can be interpreted in two ways: the trend may indicate the states are accepting the proposition that the exclusionary rule is a necessary element to assure due process and thus justifies the Court in extending the rule through the fourteenth amendment; or the trend may indicate there is no need for extending the exclusionary rule since the states themselves are taking steps to protect individual liberties. Because of this possible dual interpretation, the trend of acceptance by the states cannot be afforded the weight the Court would give it in support of their decision. To justify the imposition of the rule on the remaining states, the Court must give constitutional stature to the rule since it is untenable to assert the proposition that the Court possesses a general supervisory power over the state courts.[22] This imposition may amount to the Court supervising the procedures in state courts, but the Court can justify its position behind a legal facade of due process and find that the right being protected is "of the very essence of the scheme of ordered liberty"[23] or that it is one of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[24] This approach is necessary to avoid the considerations of federalism that are raised by the intervention of the Court in the states' administration of criminal justice.

The extension of the exclusionary rule to the states is one in a series of cases which expands the concept of due process.[25] If this expansion continues, the entire Bill of Rights may be applied against the states. This result is not without support from those on the court who feel that ". . . the pursuit of justice is not the vain pursuit of a remote abstraction; it is a

18 Elkins v. United States, 364 U.S. 206, 217 (1960).

19 Barrett, *supra* note 17, at 55.

20 Berman and Oberst, "Admissibility of Evidence by an Unconstitutional Search and Seizure," 55 N.W.L. Rev. 525 (1960).

21 Elkins v. United States, *supra* note 16, Appendix 224-32.

22 Mapp v. Ohio, *supra* note 4, at 678, dissent by J. Harlan.

23 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

24 Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

25 *E.g.*, mob domination of a trial in 1923, Moore v. Dempsey, 261 U.S. 86; the right to counsel in 1932, Powell v. Alabama, 287 U.S. 45; the effect of perjured testimony in 1935, Mooney v. Holohan, 294 U.S. 103, and see Alcorta v. Texas, 355 U.S. 28 (1957); coerced confessions in 1936, Brown v. Mississippi, 297 U.S. 278; double jeopardy in 1937, Palko v. Connecticut, 302 U.S. 319, and see Hoag v. New Jersey, 356 U.S. 464 (1957), and Ciucci v. Illinois, 356 U.S. 571 (1957). Brennan, Jr., The Bill of Rights and the States, 23 n. 54.

continuing direction of our daily conduct. Thus when the generation of 1980 receives from us the Bill of Rights, the document will not have exactly the same meaning it had when we received it. . . ."[26] The special character of due process is "its power of adaption, its suppleness, its play."[27] These characteristics of the due process clause provide the elements the Court needs to protect individual liberties against government encroachment. There is little doubt that where individual liberties are in issue the balance struck by the Court has turned against the states.[28]

The result in *Mapp* may be undesirable because of the encroachment on states' rights in the area of administration of criminal justice. Nevertheless, the decision has afforded *some* additional protection to the right of privacy. State law enforcement officers may be less inclined to act as they did in the instant case if they realize a conviction will not result from their efforts.[29] The experience in the federal system for nearly half a century shows that unreasonable searches and seizures are unnecessary for effective law enforcement. The efficiency of federal agencies has not been diminished due to the imposition of the exclusionary rule.[30] State law enforcement agencies should be similarly unaffected.[31]

Present society is not threatened by such lawlessness and criminal activity that any justification can be made for intentional and flagrant abridgement of constitutionally secured rights. There is, of course, need for the individual to surrender some of his rights of privacy to permit efficient operation of law enforcement agencies. It is within this area that the scope and limitations of the fourth amendment's guaranty will be continually reevaluated.

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[26] Warren, C. J., "The Law and the Future," Fortune, 230 (Nov. 1955).

[27] Cardozo, The Nature of The Judicial Process, 84 (1921).

[28] Friedelbaum, "The Warren Court and American Federalism—A Preliminary Appraisal," 28 Chi. L. Rev. 53, 87 (1960).

[29] "Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained." Elkins v. United States, *supra* note 16, at 218.

[30] ". . . It has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted." Elkins v. United States, *supra* note 18, at 218.

[31] "Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force. . . . In matters of scientific crime detection, the services of our FBI Laboratory are available to every constituted law enforcement officer in the nation. Full use of these and other facilities should make it entirely unnecessary for any officer to feel the need to use dishonorable methods." J. E. Hoover, FBI Law Enforcement Bulletin, Sept., 1952, pp. 1-2.